No. 14,089

IN THE

United States Court of Appeals

For the Ninth Circuit

MICHAEL CAMPODONICO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING

(Or, If Such Rehearing Be Denied, for a Stay of Mandate).

WILLENS AND BOSCOE,
By DONALD D. BOSCOE,
1016 Bank of America Building, Stockton, California.
Attorneys for Appellant and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Table of Authorities Cited

No. 14,089

IN THE

United States Court of Appeals

For the Ninth Circuit

MICHAEL CAMPODONICO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING

(Or, If Such Rehearing Be Denied, for a Stay of Mandate).

TO: The Honorable Dal M. Lemmon and Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Michael Campodonico, appellant above named, hereby petitions for a rehearing of the above cause decided April 27, 1955, for the following reasons:

(1) The Court failed to consider and pass upon material issues of law and fact.

(2) The Court failed to consider and take into account controlling precedents.

(3) The Court misconstrued controlling precedents.

(4) The Supreme Court of the United States has rendered decisions contrary to the decision of this Court.

OPENING STATEMENT.

This petition involves the interpretation of four cases decided by the Supreme Court of the United States on December 6, 1954, in relation to the use of the net worth method in computing income tax liabilities insofar as these decisions affect the decision of this Court, dated April 27, 1955, affirming the judgment and sentence of the United States District Court in the case therein mentioned. The four Supreme Court cases are:

United States v. Calderon, 75 S.Ct. 186, 348 U.S. 160;

Friedberg v. United States, 75 S.Ct. 138, 348 U.S. 142;

Holland v. United States, 75 S.Ct. 127, 348 U.S. 121;

Smith v. United States, 75 S.Ct. 194, 348 U.S. 147.

In view of the notoriety of these cases, and for brevity, these cases will hereinafter be referred to as the *Four Cases.* The questions presented and argument consist of the contentions that: (1) A satisfactory and correct beginning net worth has not been established; (2) The Government failed to consider the leads furnished; (3) A current lucrative source of income was not established; and (4) The delay in

rendering a decision deprived defendant of his constitutional rights.

BEGINNING NET WORTH.

The decision of this Court in passing upon the sufficiency of the evidence to establish a beginning net worth is brief, and as follows:

> Page 6. "We have carefully examined the record relating to appellant's assets and expenditures for the years in question, summarized above, and we find that the appellee's evidence relating to the beginning net worth and the increase in net worth supported the judgment of the trial court."

The evidence discussed, as being sufficient to support the beginning net worth, appears on page 3 of the decision: First, in the next to the last paragraph, as follows:

> "* * * The Revenue Agent then attempted to assemble information with respect to the appellant's net worth. He found no evidence of any cash on hand at the end of 1945, * * *"

- - and Second, in the last paragraph on page 3, as follows:

> "Taynton examined the public records, inquired at all local banks, and made an audit of the Capitola Liquor Store, in which the appellant had a one-half interest."

This Court determined this evidence to be sufficient to establish a beginning amount of cash on hand. The controlling issue in this case is the amount of the

beginning cash on hand, and unless otherwise specifically mentioned, the statements herein contained revolve about the said beginning cash on hand. As justification for such determination, this Court cited and paraphrased a statement appearing in *United States v. Calderon,* 348 U.S. at page 165, which statement is:

> "We must search for independent evidence which will tend to establish the crime directly, without resort to the net worth method."

The decision of this Court has promulgated an interpretation of this statement to mean that the "present-worth method" supplants the commonly known, and otherwise commonly designated, net worth method in computing a tax liability. The decision goes even further by way of its citation,

> "Evidence of unexplained funds or property in the hands of a taxpayer establishes a prima facie case of understatement of income. It is then incumbent on the defendant to overcome the logical inferences to be drawn from the facts proved. *United States v. Hornstein,* 7 Cir. 1949, 176 F 2d 217, 220."

The decision does not comment upon the nature or meaning of the term "independent evidence" except as it is paraphrased by the use of the term, "present worth". Neither is there any discussion or criticism of the meaning of this term as set forth in appellant's Supplemental Brief. There is little doubt, however, but that the term, "independent evidence", as discussed by the Supreme Court in the *Four Cases,* and the paraphrase, "present-worth", as used in the deci-

sion of this Court, refers to the taxpayer's financial circumstances and acquisition of visible assets, during the prosecution years, and his coincidental failure to report income in a corresponding amount.

According to the decision of this Court, the establishment of the "present-worth" is all that is required in a prosecution for income tax evasion; and when this "present-worth" is once established, it is then incumbent upon the defendant to overcome the logical inferences of income tax evasion, solely on account of the "present-worth" of the defendant. The logical conclusion in line with this decision is, that it is not necessary to resort to the net worth method. In fact, this Court by its decision on page 7, substituted the term, "present-worth method", in place of and when it should have used the term, "net worth method". Another conclusion to be drawn from the use of the paraphrase, "present-worth method", is that, with the elimination of the net worth method, the establishment of a beginning net worth is not necessary. And still another conclusion to be drawn is, that the financial condition of the taxpayer, prior to prosecution years, is of no consequence in establishing a prima facie case, and that it is incumbent upon a defendant to go forward with such proof, if he so desires. All of this is based upon the interpretation by this Court of the *Four Cases* decided by the Supreme Court.

The terms used in this Court's decision are ample to refute the above conclusions. Part 3 of the decision is entitled, "3. The Appellee Presented Substantial

Evidence of a Beginning Net Worth for the Appellant, * * *."

The first two sentences of Part 3 are:

> "As we have seen the appellant kept no books. In such a situation the appellee had a right to resort to the net worth increase-expenditure method of arriving at the appellant's income tax liability."

The conclusion of this Court on page 6 is:

> "We have carefully examined the record relating to appellant's assets and expenditures for the years in question, summarized above, and we find that the appellee's evidence relating to the beginning net worth and the increase in net worth supported by the judgment of the trial court."

Thus, this Court has alternately rejected the necessity for the use of the commonly known net worth method, by substituting in its place the present-worth method, and, in the same decision, has justified and relied upon the use of the net worth method. What is this so-called present-worth method as originated in this Court's decision, or its counterpart, the independent evidence as conceived by the Supreme Court?

The Supreme Court has described this question as being "crucial". This question is so crucial in fact that the Supreme Court has granted certiorari in an unprecedented number of cases to provide for a discussion of this question by the various Circuit Courts of Appeal. *Per Curiam Decisions* handed down by the Supreme Court, January 10, 1955, 348 U.S. 904.

Certainly, this independent evidence, standing alone, may not be used to establish the elements of the crime, nor a beginning net worth, nor a likely source of current income. This is in line with the citation from the *Holland* case appearing on page 7 of the decision of this Court,

> "Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source from which the jury could reasonably find that the net worth increases sprang, is sufficient."

It should be noted that the controversial statement of the Supreme Court that, "Accordingly, we must search for independent evidence which will tend to establish the crime directly, without resort to the net worth method", does not state that the independent evidence is proof of the crime, but only that it might tend to establish the crime. And, throughout the *Four Cases,* the Supreme Court explicitly explains the purposes for which the independent evidence may be used. This is for corroboration purposes only. This is succinctly stated by the Supreme Court in the *Holland* case, as follows:

> "The problem of corroboration, dealt with in the companion cases of *Smith v. United States* and *United States v. Calderon,* therefore becomes crucial."

The proof of the amount of the beginning cash on hand was an essential issue in the *Four Cases,* as well as in the instant Campodonico case. And the discussion of the use of "independent evidence" appears only

in the two cases of *Calderon* and *Smith,* wherein the admissions of the taxpayers as to a small amount of beginning cash on hand was involved. The Supreme Court held that the independent evidence corroborated the admissions—and nothing further.

There is a broad distinction between the functions of a beginning net worth and the elements of the crime. The beginning net worth is used exclusively to compute any deficiency upon which the prosecution is based. Certainly it cannot be said that if a taxpayer has a small beginning net worth, he is guilty of tax evasion by reason of this circumstance alone, and, conversely, this is equally true under circumstances when a taxpayer has a large beginning net worth. The beginning net worth is used only for the computation of a deficiency. And before any amount may be used as a beginning net worth, it must be proved by the prosecution in accordance with the rules of criminal evidence, without relaxation in the quality, competency, relevancy, or materiality of the evidence used to satisfactorily establish the beginning net worth.

The common method of proving a beginning net worth in tax evasion cases is by means of admissions by the taxpayer. And it is firmly established that the criminal evidence rules requiring corroborations of admissions are applicable to net worth cases, and specifically to the proof of a beginning net worth. The corroboration of admissions as to a small beginning cash on hand was the principal and controlling issue in the *Calderon* case, and the Court of Appeals for the Ninth Circuit held that the evidence relied upon

to corroborate the admission was insufficient because it consisted of hearsay evidence and thereby incompetent; and because of such incompetency, there was in fact no evidence to corroborate the admission. The Supreme Court approved this decision in this respect.

The Supreme Court proceeded from this point, however, to look for other evidence which might be used to corroborate the admission, and arrived at the solution of using the financial circumstances and acquisition of visible assets, during the prosecution years, and the coincidental failure to report for tax purposes a corresponding amount, to tend to support the receipt of unreported income during the prosecution years, by reason of the fact that taxpayer made an admission that he did not have such funds in prior years. These circumstances, the Supreme Court held were sufficient to corroborate the admissions of taxpayer—and nothing further.

It is pertinent to note that the issue of using the independent evidence of financial circumstances during the prosecution years to corroborate the admissions of taxpayer as to a small beginning cash on hand, was not presented to the Ninth Circuit Court of Appeals for determination, or at least this phase of the case was not discussed in its decision, and consequently no ruling was made on this question. The Supreme Court, impliedly at least, approved each and every determination made by the Court of Appeals for the Ninth Circuit in the *Calderon* case. The reversal was made solely upon grounds which the Circuit Court was not called upon to decide. While the

Supreme Court decision was made upon the general question decided by the Circuit Court, to-wit: corroboration of admissions, it cannot be correctly stated that the specific rulings of the Circuit Court were reversed. To the contrary, its determinations were approved. Any other interpretation of the decision of the Supreme Court is erroneous.

The decision of this Court in the instant Campodonico case, on page 8, in interpreting the decision of the Supreme Court in the *Calderon* case, appears to be that the "independent evidence", therein referred to, will tend to establish the crime directly, without resort to the net worth method. By implication, it follows that the decision is that the "independent evidence" is not confined in its use to establish a beginning net worth, but may be used to establish the elements of the crime directly, whether or not used in connection with a net worth computation.

A cursory reading of the said controversial statement might result in such an interpretation, but, in view of the numerous and direct statements to the contrary in the *Four Cases,* such an interpretation should not be established as authority in this jurisdiction.

It should be remembered that in this instant Campodonico case, the beginning cash on hand is one of the essential and material issues, just as it was in the *Four Cases.* The necessity for a satisfactory beginning net worth has long been established as a primary requisite for a net worth computation. Insofar as

known, this precept has never been denied and the decisions of the *Four Cases* are no exception.

The decision of this Court overlooks and fails to consider the material issues of law and fact in respect to the beginning net worth. Specifically, the decision fails to state whether or not the statement of the revenue agent that, "He found no evidence of any cash on hand at the end of 1945" is sufficient to establish the beginning cash on hand to be zero, regardless of the explanation given and leads furnished. Neither is there any explanation or justification for the use of any other evidence to support the finding of the revenue agent that there was no beginning cash on hand.

A discussion of the lack of probative value of such evidence appears in appellant's opening and supplemental briefs, to which reference is hereby made.

LEADS.

The decision of this Court is void of any comments on leads. This question is the subject of an extended discussion in the *Holland* case. It is an extremely important issue in the instant Campodonico case. It involves the determination of whether there is a total lack of evidence to establish the amount of the beginning cash on hand as used in the Government's net worth computation. And further, it involves the sufficiency of appellant's evidence to establish the amount claimed by him as his beginning cash on hand, which is more than ample to account for the expenditures

and accumulation of property forming the basis for the alleged deficiency. There is no comment in the decision, neither is there any evidence in the record, of any lead investigation. As stated in the *Holland* cases,

> "When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury."

This Court has recognized the leads given by appellant. On pages 4 and 5 of its decision there is a comparatively lengthy enumeration of the leads, significant excerpts of which are:

> "Taynton asked the appellant 'where he got all the money to buy all the assets when he hadn't reported that much income', and the latter replied that 'he made it gambling'—that 'he was a gambler'.
>
> "4. I believe his final position on that was that the $40,000 had come from other than embezzled funds.
> Q. From what source?
> A. Gambling, from gambling.
> The Court. During what period?
> The Witness. From '43 on."

The trial judge was interested in learning during what period the gambling operations wer carried on. The testimony was, "From '43 on", or during a period prior to the prosecution years. Still, the record is void of any evidence of an investigation as to the source of funds which might have been *acquired prior to the prosecution years* as an explanation for the *expenditures made during the prosecution years.*

While, as stated above, the decision is void of any comment on leads, and that there is no evidence of any lead investigation, it might be surmised that this Court considered it unnecessary to supply such deficiencies. This surmise arises from the citation of and comment upon the cases, *United States v. Hornstein,* 7 Cir., 1949, 176 F 2d 217, 220; and *Gariepy v. United States,* 6 Cir., 1951, 189 F 2d 459, 463, and cases cited. Evidently, these cases were cited as authority for the propositions: that unexplained funds or property in the hands of a taxpayer establishes a prima facie case of understatement of income; and that it is then incumbent upon the defendant to overcome this prima facie evidence; and that the Government is not required to prove a negative or to refute all possible speculations as to the source of a defendant's asserted funds.

While these propositions are more or less general, it is surmised that the principles were applied by this Court in passing upon the sufficiency of the Government's evidence for its beginning net worth, and its related duty to investigate leads. This attitude is an example of the liberal interpretation of the requirements of proof in a net worth case, mentioned on pages 31 et seq. of Appellant's Opening Brief, and on page 26 of Appellant's Supplementary Brief.

Opposed to this liberal view, however, are the representative cases of *Bryan v. United States,* 5 Cir., 1949, 175 F 2d 223, and *Fenwick v. United States,* 7 Cir., 1949, 177 F 2d 488, and *United States v. Chapman,* 168 F 2d 997. These cases advocate a strict interpreta-

tion of the requirements of proof in a net worth case, in keeping with the decisions of the *Four Cases*. A discussion of these cases appears on pages 30 et seq. of Appellant's Opening Brief, and on page 26 of Appellant's Supplemental Brief.

While the *Calderon* case did not in express terms discuss or announce a policy of adherence to either a strict or a liberal interpretation, the questions decided definitely fix its attitude as leaning toward the strict view. As examples, the case determined: (1) That a satisfactory beginning net worth must be established; (2) That if an admission of taxpayer is relied upon to establish the beginning net worth, the admission must be properly corroborated; and (3) That hearsay evidence is not competent evidence for such corroboration requirements. Insofar as these questions were decided by the Circuit Court, the Supreme Court agreed and approved. And the *Holland* case definitely establishes the necessity to investigate all reasonable leads.

The supplemental briefs of the parties in this action were submitted to discuss the so-called net worth method of income tax computations used in this case, in light of the *Four Cases* decided by the Supreme Court. The decision of this Court was based upon an isolated statement that, "we must search for independent evidence which will tend to establish the crime directly, without resort to the net worth method." If this decision is carried to a logical conclusion, it is that, in a net worth case, it is not necessary to resort to the net worth method. Can it be correctly

stated that the Supreme Court has discarded the long established method of proof in net worth cases? Or, is it not more reasonable and proper to state that the Supreme Court has merely passed upon one or more steps or requirements of the method of proof. In the *Calderon* case the single step or requirement was the corroboration of admissions. Any interpretation of the decision of the Supreme Court to the contrary is erroneous.

LUCRATIVE SOURCE OF CURRENT INCOME.

The decision of this Court adheres to its paraphrased term of "present-worth method", in place of net worth method, in connection with its discussion of currently taxable income. In this connection, however, the present-worth method is not relied upon to eliminate the necessity for such proof. To the contrary, the decision accepts the precepts of the *Holland* case as to this requirement, as quoted:

> "Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source from which the jury could reasonably find that the net worth increases sprang, is sufficient."

The decision states that the likely source of net worth increases is winnings from gambling. The only basis commented upon for such finding is, "In the case of an admitted and notorious gambler, the 'likely source' would be winnings from gambling." Thus, the evidence relied upon is restricted to reputation, which is hearsay and incompetent, and entirely

lacking in corroboration. In fact, the evidence of appellant's activities, during the prosecution years, was all to the effect that he did not gamble. And the fair implication of all evidence adduced is that appellant's reputation as a gambler was confined to pre-prosecution years. Of course, this pre-prosecution years gambling was admitted by appellant, and this information was furnished as a lead and explanation to account for the accumulation of his beginning cash on hand. The Ninth Circuit Court of Appeals held in the *Calderon* case that such hearsay evidence is incompetent and irrelevant, and, lacking corroboration, is of no force or effect whatsoever. And in this respect, the Supreme Court approved the decision.

DELAY IN RENDERING DECISION.

A delay of one year and two months in rendering a decision and pronouncing judgment is unduly prolonged. It is upon this abstract principle that exception was taken in this appeal. Although this is contrary to the decisions of the cases cited, no valid reason is available to disturb a precedent established by this Court.

CONCLUSION.

The instant Campodonico case is not simple. The trial judge exhibited much interest and concern in

the evidentiary issues, and invited briefs from the parties on many of the points decided by the Supreme Court. He expressed himself as not being sure of the rules to be applied in view of the diversity of the decisions in the Circuits. Nevertheless, he did grant motions for acquittal on two counts.

The decision rendered by this Court is extremely general and vague, and appears to be based more upon the righteous and religious concepts of an indignant judiciary than upon the fundamental precepts of an orderly administration of justice. The newly coined term, "present-worth method", is particularly vague and misleading. Insofar as the meaning of this term might be gleaned from the decision, it is opposed to the law and facts in this case, and contrary to the decisions of the Supreme Court.

Petitioner respectfully submits that the issues raised in this petition are of importance to both the prosecution and defense of income tax evasion cases, and particularly when a net worth method of computation is involved. The Supreme Court went to extraordinary lengths in commenting upon the issues involved in this case, and has granted certiorari in a large number of cases to permit the Circuit Courts to affirm or change their decisions in light of the *Four Cases*. A general summarization of the *Four Cases* in the form of a single term is not appropriate.

Petitioner respectfully requests that this petition for a rehearing be granted, and that upon a rehearing the judgment and sentence of the District Court

be reversed; or, if such rehearing be denied, a stay of mandate be issued pending an appeal to the Supreme Court.

Dated, Stockton, California,
May 23, 1955.

Respectfully submitted,
WILLENS AND BOSCOE,
By DONALD D. BOSCOE,
Attorneys for Appellant and Petitioner.

Certificate of Counsel

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, Stockton, California,
May 23, 1955.

Donald D. Boscoe,
Of Counsel for Appellant and Petitioner.